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Nos. 82-185, 82-246, 82-259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,

Petitioner,

v.

BOSTON CHAPTER, N.A.A.C.P., *et al.*

BOSTON POLICE PATROLMEN'S ASS'N, INC.,

Petitioner,

v.

PEDRO CASTRO, *et al.*

NANCY B. BEECHER, *et al.*,

Petitioners,

v.

BOSTON CHAPTER, N.A.A.C.P., *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

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QUESTION ADDRESSED

Is this appeal moot?

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On Writs of Certiorari to the United States Court of Appeals For The First Circuit

BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS AMICUS CURIAE

Interest of Amicus Curiae

The NAACP Legal Defense and Educa-

tional Fund, Inc., is a non-profit corporation incorporated under the laws of the State of New York in 1940. It was formed to assist Blacks to secure their constitutional rights by the prosecution of lawsuits. Its charter declares its purposes include rendering legal aid gratuitously to Blacks suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel.

The opinion of the court of appeals in the instant case raises a number of issues directly affecting pending litigation involving Blacks represented by the Legal Defense Fund. Amicus believes that the decision of the first circuit was correct and that, should this Court reach the merits of this case, that decision should be affirmed. We do not, however, believe it is necessary to reach the issue of whether to affirm, because events occurring

since the decision of the court of appeals have rendered this controversy moot.

I. This Appeal Is Moot

The district court order challenged in this Court was entered on August 7, 1981, to resolve a dispute as to how to select 515 Boston policemen and firefighters to be terminated because of a 1981 city financial crisis. The respondents, anxious to preserve the progress that had been made in integrating blacks and hispanics into the police and fire departments, urged that fewer than 15% of those be laid off should be black or hispanic. The petitioners argued that the group to be fired should be selected solely on the basis of seniority, and thus be about one half non-white. The district court concluded that the group should be chosen in the manner urged by respondents. Petitioners appealed on

behalf of the 222 white officers adversely affected by the order of the lower court. When this case was pending in the court of appeals, 515 officers had in fact been laid off; the first circuit affirmed the district court's decision and refused to direct the rehiring of the 222 whites at issue.

Today, however, those 222 whites, and indeed all of the other 515 dismissed officers, have been offered their jobs back. In June 1982, barely a month after the decision of the court of appeals in this case,[1/] Massachusetts enacted legislation providing Boston with funds to rehire the police officers and firefighters

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1/ A similar coincidence occurred in August of 1982 when Boston city officials suddenly agreed on a proposal to avert the lay offs only two days after the district court order in this case. Boston Globe, August 10, 1981, p. 1.

who were laid off in 1981, and expressly requiring the city to do so. 1982 Mass. Acts, ch. 190, § 25. That legislation also provides that the 515 officers terminated during the 1981 layoffs cannot again be laid off for fiscal reasons. Id. By July 1, 1982, all the police officers and firefighters available for recall had been reinstated.[2/]

The practical controversy which prompted the disputed court order has thus ended. There is no need or reason for this Court to make the painful decision as to who will be dismissed, for the dismissals are over. Since July, 1982, the city of Boston, far from reducing the size of its police and fire departments, has actually been hiring new police officers and firefighters. On November 4,

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2/ Petition for Writ of Certiorari, No. 82-185, p. 8.

1982, the police department swore in 60 new recruits;[3] since the department apparently intends to remain at its current size of 1800 officers,[4] additional officers will be hired in the months ahead to make up for attrition. An additional 40 firefighters were sworn in on December 8, 1982.

The injunction entered in this case on August 7, 1982, regarding "reductions in force ... on account of lack of funds"[5] no longer has any operational significance, for no such layoffs are occurring or contemplated. None of the parties suggests that layoffs in the Boston police and fire departments are likely to recur in the future. Unlike cyclical industries, such

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3/ Boston Globe, November 5, 1982, p. 17.

4/ Boston Globe, November 7, 1982, p. 25.

5/ Petition for Writ of Certiorari, No. 82-185, p. A.28.

as construction or automobile manufacturing, where layoffs or recalls occur with each change in the economy, reductions in municipal work forces, particularly among police officers and firefighters, remain happily rare, and are resorted to only in the face of the most extraordinary and unusual fiscal difficulties. The controversy which gave rise to the injunction at issue in this case has thus ended, and there is no reasonable expectation that any Boston police officers and firefighters, least of all the 222 whites adversely affected by that injunction, will be laid off again. See Murphy v. Hunt, 71 L.Ed.2d 353, 357 (1982); DeFunis v. Odegaard, 416 U.S. 312, 316-19 (1974).

The United States[6/] and the Fire-

6/ Brief for the United States, p. 9, n.8.

fighters Union[7/] note that there are still pending before the Massachusetts Civil Service Commission administrative appeals on behalf of white officers laid off in 1981. Those appeals, of course, no longer seek reinstatement, since the officers involved have been rehired; the relief at issue is back pay for the ten months during which they were laid off. The only question technically before this Court, whether the district court erred in issuing its order of August 7, 1981, is itself moot. The existence of these related administrative proceedings might give the parties here a legally cognizable interest in a review by this Court of that district court order, but only if the parties to and the legal issues presented by those proceedings and the instant case were identical.

7/ See Brief for Boston Firefighters, No. 82-195, p.7, n.1

In University of Texas v. Camenisch, 451 U.S. 390 (1981), the plaintiff, a deaf graduate student, sought to compel the university to provide him with a sign-language interpreter. The district court entered a preliminary injunction requiring that the university do so and the court of appeals affirmed. By the time the case reached this Court, however, Camenisch had graduated. Although this development rendered moot the propriety of the preliminary injunction, there remained a dispute as to whether Camenisch or the university should pay for the services of the interpreter. This Court nonetheless vacated the order of the court of appeals as moot, reasoning that the lower court decisions regarding the preliminary injunction were not "tantamount to decisions on the underlying merits...." 451 U.S. at 394. It

emphasized that the issues raised by a motion for a preliminary injunction and those raised by a final decision on the merits were not the same. 451 U.S. at 394-398. See also Murphy v. Hunt, 71 L.Ed.2d 353, 356-57 n.5 (1982) (mootness of claim for pre-trial bail not avoided by existence of claim to bail on appeal).

There is little reason to believe that the resolution of the instant appeal would be dispositive of, or even relevant to, the pending administrative proceedings. The issues here concern, inter alia, the meaning of Title VII of the Civil Rights Act of 1964 and the scope of the authority of a federal district court judge to supervise and enforce a consent decree. The issue in the state proceeding will be whether under state law a city agency which lays off employees in a manner required by

a binding federal decree must compensate with back pay those adversely affected by that decree. Regardless of whether the district court erred in issuing its order of August 7, 1981, the defendants were obligated to comply. Walker v. City of Birmingham, 388 U.S. 307 (1967). It is, of course, conceivable that Massachusetts law will be construed by agencies or courts of that state to require redress for whites injured by that compliance. But the parties suggest no theory, and none can readily be imagined, that would lead to the conclusion that a city's liability for obeying a federal court injunction would depend on whether or not that injunction was subsequently reversed.

The parties to the administrative proceedings, moreover, are not before this Court in an adversarial relationship.

The plaintiffs in those proceedings are white officers laid off in 1981, none of whom are parties to the federal litigation. The defendant in those state proceedings is the city of Boston; the city is a nominal party to the instant case, but it took no position on this controversy in the lower courts, did not appeal from the district court's order, and apparently does not intend to file a brief in this Court. The only participant in the state administrative proceedings that is actively involved in the instant case is the Massachusetts Civil Service Commission, whose presumed role in those proceedings is not that of a party but of a judge. The Civil Service Commission and the unions urge this Court to reverse the district court order of August 7, 1981; it is unclear, however, whether under state law

the impact of any of such a reversal would serve to support or to undermine the administrative claims of the laid off officers. The only party disputing the petitioners' contentions in this Court are the federal plaintiffs; but they assert no interest in the outcome of the state administrative proceedings, and claim no authority or desire to act on behalf of either the city of Boston or the white officers pursuing those appeals.

There is a suggestion that the language of the order entered by the district court may directly interfere with the ability of the Civil Service Commission to grant back pay or other relief in the pending administrative proceedings. The relevant portion of that order provides:

> 4. In the event that a firefighter's appeal of termination to the members of the Massachusetts

> Civil Service Commission challenges the method of termination set forth herein, the defendant members of the Civil Service Commission are hereby restrained and enjoined from disapproving, invalidating or interfering with the termination on that basis.8/

The United States speculates that this "could be interpreted as barring the Commission from granting any back pay".9/ The Firefighters in their petition for writ of certiorari asserted that this order actually forbade any relief in those administrative proceedings,10/ although they do not advance that argument in their brief on the merits.11/

8/ Petition for Writ of Certiorari, No. 82-185, p. A.29.

9/ Brief for the United States, p. 9, n.8 (emphasis added).

10/ Petition for Writ of Certiorari, No. 82-185, p. 17.

11/ See Brief for Boston Firefighters, No. 82-195, p. 7, n. 1.

A literal reading of the quoted paragraph indicates that the district court intended only to forbid the Civil Service Commission from ordering that layoffs occur in a manner in conflict with the decision of the court. The plaintiffs in the proceedings below never sought to limit the rights of whites to back pay, and there is no reason to believe that the trial judge intended to do so. If the Civil Service Commission were to attempt to provide some form of compensation to police officers or firefighters who were laid off between August 1981 and June 1982, such an effort could not readily be characterized as "invalidating or interfering with" the federal court order. In any event, since the lay off controversy which gave rise to the disputed August 7, 1981, order no longer exists, that order, including

paragraph 4, must be vacated as moot, thus removing any possible doubts as to the ability of the Civil Service Commission to act as state law requires in disposing of the pending administrative appeals.

The United States urges that this appeal is not moot because the injunction at issue "prohibit[s] indefinitely the application of the Massachusetts seniority statute."[12/] But the issuance of a final injunction does not create a permanent case or controversy which endures regardless of changes in the circumstances giving rise to the litigation. If pending appeal the dispute to which an injunction is addressed has ended, that injunction is ordinarily vacated as moot.[13/] Thus if the under-

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12/ Brief for the United States, p. 9, n.8.

13/ University of Texas v. Camenisch, 451 U.S. 390, 398 (1981); Indianapolis School Comm'rs v. Jacobs, 420 U.S. 128 (1975).

lying controversy has abated there will be no injunction whose correctness need be determined.

The Firefighters assert that "the underlying dispute as to the validity of [the district court order] continues."[14/] The scope and intensity of the ongoing public dispute about affirmative action is illustrated by the large number of amicus briefs in this well publicized and controversial case. Many of the amici have a long standing interest in this subject, and press this Court for a decision vindicating their historic positions. See Sierra Club v. Morton, 405 U.S. 727, 739 (1972). To this latest battle concerning race-conscious remedies, however, the 222 white police officers and firefighters formerly

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14/ Petition for Writ of Certiorari, No. 82-185, p. 17.

affected by the district court order are now mere spectators. They have returned to their jobs, are not in danger of being laid off again, and face no obstacles in obtaining whatever redress for that lay-off state law may provide. The public controversy about affirmative action may be live, concrete, and fiercely contested, but the legal controversy concerning the district court order of August 7, 1981, is moot.

II. The First Circuit Should Be Affirmed

As noted at page 2, we believe the decision of the First Circuit is correct. Accordingly, should this Court determine to reach the merits, we believe that the First Circuit should be affirmed.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case remanded with instructions to vacate as moot the order of August 7, 1981.

Respectfully submitted,

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